U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

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CASE NO.: 2000-LHC-904

OWCP NO.: 7-143294

IN THE MATTER OF

JOHN GRAY
Claimant

v

MOSS POINT MARINE/HALTER MARINE SHIPYARD
Employer

RELIANCE NATIONAL INDEMNITY CO.
Carrier

DECISION AND ORDER ON REMAND

Background

A Decision and Order issued in this case on October 16, 2000, denying Claimant's claim for medical benefits under the Act. The Claimant appealed that decision, Employer cross-appealed and by Decision and Order dated November 2, 2001, the Benefits Review Board vacated my Decision and Order and remanded the claim to me with instructions. Both parties have filed briefs concerning the issues raised on remand. The matter is now ripe for decision.

Discussion

The Benefits Review Board remanded the matter for me to (1) determine whether Claimant invoked the Section 20(a) presumption by demonstrating he in fact

suffered an injury in May, 1993; (2) if the presumption is invoked whether Employer rebutted the presumption; and (3) whether Claimant's subsequent employment with L & L Enterprises (L&L) constituted an intervening act which severed Moss Point Marine's (Moss Point) liability.

Section 20(a) Presumption

In my original Decision and Order, I found Claimant, through his testimony and Dr. Gonzalez's chart notes of June 1, 1993, recording Claimant's arm pain due to lifting, had invoked the Section 20(a) presumption that a harm occurred to him in May, 1993, and that conditions existed at work which could have caused the harm. The Board, however, vacated my finding because I failed to weigh all relevant evidence regarding an occurrence of a work accident prior to determining if the Section 20(a) presumption was invoked. The Board noted that I should discuss the fact that in 1996 Claimant gave a deposition and provided written interrogatories involving a subsequent back injury claim wherein he did not reference an earlier arm or hand injury. On remand, the Board also pointed out Dr. McCloskey's early reports only reference the Claimant's September 1993, back injury.

While I am somewhat surprised at the heavy burden placed on Claimant by the Board to invoke the Section 20(a) presumption,[1] when I weigh all evidence relevant to whether an accident or injury in fact occurred, I again make a finding that Claimant has demonstrated a prima facie case sufficient to invoke the Section 20(a) presumption.

As pointed out by Claimant's brief on remand, although he did not specifically explain his hand arm injury in the 1996 deposition, given in regard to his subsequent back injury, Claimant did testify that he had previously pulled muscles in his arm, shoulders and back for which he sought treatment from Dr. Gonzalez. Also, when his

[1] I say this in view of the recent unpublished case of *Donald Durant, Jr. v. Bayou Fleet, Inc.***,** *et al***,** BRB No. 01-0455 (January 11, 2002) wherein the Board stated on page 2 ". . .Claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather Claimant must show that working conditions existed which could have caused his harm." Then on page 3 the Board further noted that in order to make out a prima facie case, ". . . the Administrative Law Judge erred in requiring Claimant to demonstrate his employment activities with Employer either caused, aggravated or accelerated his back condition."

deposition was again taken specifically for the hand arm injury, Claimant testified about lifting manhole covers in the spring of 1993, and thereafter experiencing hand and arm pain sufficient to cause him to seek treatment from Dr. Gonzalez. This testimony is corroborated by Dr. Gonzalez's notes of June 1, 1993, which reveal an arm sling was suggested and medication prescribed for pain and inflamation. As to Dr. McCloskey's treatment, granted Claimant initially sought his aid for a back injury, but even so did reference pain in his arm and hands at that time, though no history of an occurrence at work was recorded.

In sum, I accept Claimant's explanation that he dealt with his hand and arm pain and continued to work and filed no claim for the condition until 1997. I do not find his failure to file an earlier claim or his failure to disclose a specific history concerning his earlier hand arm discomfort during discovery in another claim, or initially to Dr. McCloskey, to be sufficient to defeat his sworn testimony which was corroborated by Dr. Gonzalez's chart notes. Consequently, once again I find Claimant's evidence sufficiently reliable to entitle him to invocation of the Section 20(a) presumption that in May, 1993, he suffered harm to his hands and arms while at work in the employment of Moss Point Marine.

Section 20(a) Rebuttal

In my original Decision and Order I found rebuttal had occurred in this instance because Dr. McCloskey did not suspicion Claimant had carpal tunnel syndrome until August 15, 1994, some 15 months after the May, 1993, episode and at a time Claimant was no longer employed with Moss Point. Additionally, Claimant did not actually test positive for the syndrome until June 1, 1995, and at that time Dr. McCloskey opined Claimant had experienced further problems as a result of working at his then current job with L&L.

Based on that evidence, and when weighed against Dr. Gonzalez's vague report of June, 1993, and the fact Dr. McCloskey's early test was negative for carpal tunnel syndrome, I found Employer had not only rebutted the presumption, but when weighed as a whole Claimant had not provided sufficient evidence to prove causation. The Board, however, on page 4 of its decision and order obviously chose to weigh the evidence themselves, and, as I read their opinion, reached a different conclusion finding the Section 20(a) presumption was not successfully rebutted by Employer.

Inasmuch as there is nothing left to reconsider, I feel I am bound by the Board's determination on this issue:

> . . . . In order to rebut the Section 20(a) presumption employer must produce substantial evidence that claimant's harm is not related to his employment. *Conoco*, 194 F.3d 684, 38 BRBS 187 (CRT). The fact that carpal tunnel syndrome was not definitively diagnosed prior to claimant's subsequent non-covered employment does not establish that claimant's harm is not work-related. Dr. McCloskey stated in August 1994 that he suspected claimant had carpal tunnel syndrome, CX 5, and he explained in 1995 that he knew from a clinical standpoint that claimant had carpal tunnel syndrome, as it is a progressive condition. CX 7. Dr. McCloskey, moreover, does not state that claimant's condition is not work-related, and thus his opinion is not substantial evidence severing the connection between claimant's condition and his employment. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *affd*, 892 F.2d 173, 23 BRBS 13 (2d Cir. 1989).

Intervening Cause

Finally, the Board found that I had committed error by determining liability between the two employers by applying the standard of natural progression versus aggravation, and I was instructed to revisit the facts to determine instead whether Claimant's subsequent employment with L&L constituted an intervening cause of Claimant's condition. In doing so in the Fifth Circuit, wherein this case arises, the Board pointed out that "a supervening cause must be an influence originating entirely outside of employment which 'overpowers and nullifies' the initial injury." In other words, the injury remains compensable "if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is now shown to have been worsened by an independent cause." Finally, the Board also noted that even if the subsequent non-covered employment "brought the problem to the forefront," Employer is relieved only for that portion of medical expenses attributable to the intervening cause, unless apportionment cannot be accomplished in which event the employer remains liable.

Call it what you will, "aggravation" or "intervening cause," my opinion remains the same that the repetitious work Claimant performed at L&L overpowered

Claimant's initial injury. In other words, Claimant would not be in the condition he finds himself "but for" this independent cause, i.e., his work at L&L.

Claimant argues that because Dr. McCloskey noted in his June 12, 1995, report that carpal tunnel syndrome is a progressive condition, I should conclude that Claimant's symptoms while working at L&L are the result of the natural and unavoidable progression of his condition. I do not agree. Dr. McCloskey said Claimant was symptomatic because he was working with his hands at L&L, not because Claimant's condition had overtaken him by natural progression.

As I found in my original decision, it was not until some 15 months after Claimant's May, 1993, episode with lifting manhole covers that Dr. McCloskey stated Claimant "possibly" had carpal tunnel syndrome, but even then Dr. McCloskey did not rule out the source of Claimant's condition as originating from his neck.

It was not until June 1, 1995, that Claimant tested positive for carpal tunnel syndrome, and that test came about because Claimant returned to Dr. McCloskey suffering pain and swelling in his hands as a result of his then "current job" at L&L where he had been employed since March 21, 1995. A fact that did not go unnoticed by Dr. McCloskey who noted in his June 12, 1995, letter the "key thing though is that his [Claimant's] current employment has really brought the problem to the forefront."

Regarding Claimant's employment activities with L&L, while I might have misstated the weight lifting involved, I did not misstate the fact Claimant testified he had to use his hands to weld up to 300 "arms" on stands per day with each arm requiring six welds. Claimant testified that he used both hands to perform this task and after the welding would remove the attached pieces and hang them up. As a result of this activity, Claimant testified his arms and hands started swelling, that he complained to his foreman and that he ultimately sought treatment from Dr. McCloskey.

In my opinion, based on Dr. McCloskey's observations as well as Claimant's own testimony, Claimant's repetitive job duties at L&L constituted an independent cause which worsened Claimant's condition. As pointed out by Employer in its brief, while Claimant might have had some symptoms which caused Dr. McCloskey to earlier suspect carpal tunnel syndrome, all objective testing was negative until Claimant

began working with L&L performing repetitive and continuous motions with his hands and arms.

In sum, it is hard for me to imagine a factual scenario that more clearly falls within the Fifth Circuit's requirements that the supervening cause be an influence which "overpowers and nullifies" the initial injury. It is no stretch to infer that had Claimant not chosen to take a job involving 1800 welds per day, his condition would not have been what Dr. McCloskey found it to be on June 1, 1995. Dr. McCloskey's report inasmuch says the same.

Apportionment of Medical Expenses

In their decision, the Board noted that even should I find a worsening of Claimant's condition by an independent cause, Employer would remain fully liable for medical expenses unless the cause of Claimant's condition could be apportioned between the initial injury and the subsequent event. Here I find apportionment to be possible.

Claimant's back injury, for which he was being treated by Dr. McCloskey, reached maximum medical improvement in August, 1994. The treatment Claimant subsequently sought for his hands and arms was in June, 1995, some two and a half months after he had commenced working at L&L and experiencing swelling and pain in his hands due to the repetitious nature of the work he was there performing. Consequently, it is my finding that while Claimant suffered an injury at Moss Point in May of 1993, that the Employer's liability for medical expenses ceased prior to June 1, 1995, and any medical expenses Claimant incurred or incurs commencing with his employment with L&L in March 1995, should not be the responsibility of Moss Point. Claimant had ceased going to Dr. McCloskey until he became symptomatic in the spring of 1995, and those symptoms were caused by L&L employment, not Moss Point employment.

ORDER

Claimant's claim for medical benefits is granted to the extent that Employer, Moss Point Marine, shall be liable for all medical expenses Claimant incurred regarding treatment to his arms and hands arising out of his May 1993, injury, up to

and until March, 1995, after which time Moss Point Marine is relieved of further liability.

Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132.

So ORDERED this 20th day of February, 2002, at Metairie, Louisiana.

A
C. RICHARD AVERY
Administrative Law Judge

CRA:kw